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SUBJECT: MALAWI: PRESIDENT WINS ELECTORAL COMMISSION COURT CASE

¶1. Summary: On January 17, a Malawi High Court Judge upheld President Mutharika's appointments to the Malawi Electoral Commission (MEC). President Mutharika appointed the nine commissioners in February 2007 but the two major opposition parties, the United Democratic Front (UDF) and the Malawi Congress Party (MCP), were granted a court injunction that stopped the President from swearing-in the nine nominees. The two parties challenged the appointments in the High Court, claiming that they had not been consulted as required by Electoral Commission Act. Opposition parties also demanded to have partisan representatives on MEC, while the GOM has maintained that according to the Constitution, the commissioners must be independent of political parties. The President authorized the immediate swearing in of his appointees based on verbal confirmation of the court decision, but the opposition intends to appeal the ruling to the Supreme Court as soon as the written decision from the High Court is released. End Summary

¶2. On January 17, the Malawi High Court ruled that President Mutharika's nine appointments to the MEC were legal and could be sworn-in immediately. Mutharika appointed the nine commissioners in February 2007, but the commissioners were stopped from taking their positions by an opposition-obtained injunction. The long-awaited case has been at the center of a stalemate between the government and the two main opposition parties that has left the MEC with only one active commissioner and delayed some preparations for the 2009 general elections.

¶3. The case centered on the interpretation of the phrase "in consultation with leaders of political parties represented in Parliament" in the Electoral Commission Act. The opposition demanded that the GOM follow the custom of the previous government, wherein political parties in the National Assembly provided names of nominees from which the President made his appointments. President Mutharika "consulted" (notified) opposition parties only after he had already made his selections. The High Court sided with the President, ruling that the former arrangement was merely a custom and that his appointments were legally valid. The court further noted that consultation does not require the decision-maker to accept the views of those being consulted.

¶4. While the verbal decision is sufficient for the government to confirm the new commissioners, a written decision, which is necessary for the opposition to file an appeal to the Supreme Court of Appeal, was not released with the initial announcement. Lawyers for the opposition planned to file a general appeal if the written decision was not released soon. The nine new commissioners will bring the total on the MEC to ten and allow the MEC to intensify preparations for the 2009 general elections

¶5. Comment: The MEC case is another example of the Malawi court system being asked to solve what are essentially political disagreements. While the High Court clearly ruled that "consultation" did not mean approval by parties in the National Assembly, the 11-month delay to get the ruling will force an inexperienced MEC to rush its preparations for the 2009 elections. Several of the nine new appointees clearly have ties to the president, and Mutharika's refusal to seek consensus on the slate

has weakened public confidence in the MEC's integrity. At the same time, the impending appeal will further handicap the MEC's preparations and could result in inaccurate voter roles, poorly demarcated districts, and inexperienced election officials, all of which could also disadvantage opposition parties.

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